Supreme Court, U.S.
FILED

(1)

No. 03 472 SEP 29 2003

IN THE

Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

KATE MARTIN
JOSEPH ONEK
CENTER FOR NATIONAL SECURITY STUDIES
1120 19th Street, N.W.
Washington, D.C. 20005
(202) 721-5650

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
LEE GELERNT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

PAUL M. SMITH
Counsel of Record
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ELLIOT M. MINCBERG
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for Petitioners
Additional Counsel Listed on Inside Cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

182 pp

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, NW, #119
Washington, D.C. 20036
(202) 457-0800

DAVID L. SOBEL
ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave., NW
Washington, D.C. 20009
(202) 483-1140

QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly ruled that the Department of Justice was exempt from any obligation under the Freedom of Information Act to release names and other basic information relating to hundreds of people who were detained in the weeks immediately following September 11, including many who were not even suspected of any linkage to terrorist activities?

2. Whether the First Amendment prohibits the Government from refusing to disclose the identities of those whom it has arrested and detained, absent a specific showing of a compelling need for secret arrests?

PARTIES TO THE PROCEEDING

Petitioners are the Center for National Security Studies, American Civil Liberties Union, Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, The Multiracial Activist, The Nation Magazine, People for the American Way Foundation, Reporters Committee for Freedom of the Press, World Organization Against Torture. Respondent is the United States Department of Justice. All parties to the proceedings below are parties here.

RULE 29.6 DISCLOSURE

No corporate party to this petition is owned in part or in whole by a parent corporation or a publicly held company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Detainees Arrested in the Weeks After September 11 4

B. The Proceedings Below 8

1. The FOIA Request and the Government's Responses 8

2. The District Court 12

3. The Court of Appeals 13

REASONS FOR GRANTING THE WRIT 16

I. THE MAJORITY BELOW ERRED IN GIVING UNPRECEDENTED DEFERENCE TO GOVERNMENT EXPLANATIONS THAT WERE UNPERSUASIVE ON THEIR FACE, OVERLY BROAD, AND WITHOUT ANY SUPPORT IN THE RECORD 18

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FIRST AMENDMENT PROHIBITS SECRET ARRESTS AND DETENTIONS, EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES. 25

CONCLUSION 30

Appendix A

Opinion, *Center for National Security Studies v. United States Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) 1a

Appendix B

Opinion, *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) 64a

Appendix C

Constitutional and Statutory Provisions Involved 104a

Appendix D

Declaration of James Reynolds, *Center for National Security Studies v. United States Department of Justice*, No. 01-2500 (D.D.C. filed Jan. 11, 2002) 106a

Appendix E

Supplemental Declaration of James Reynolds, *Center for National Security Studies v. United States Department of Justice*, No. 01-2500 (D.D.C. filed Feb. 4, 2002) 123a

Appendix F

Declaration of Dale Watson, Detroit Free Press *v.* *Department of Justice*, No. 02-70339 (D.D.C. filed April 9, 2002) 128a

TABLE OF AUTHORITIES

CASES

ACLU of New Jersey, Inc. v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *certification denied*, 803 A.2d 1162 (N.J. 2002) 5

CIA v. Sims, 471 U.S. 159 (1985) 20

Campbell v. Untied States Department of Justice, 164 F.3d 20 (D.C. Cir. 1998) 18-19

Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64 (D.C. Cir. 1986) 19

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) 4, 21, 26

Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381 (D.C. Cir. 1989) ... 17, 19

Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992) 17, 19

King v. United States Department of Justice, 830 F.2d 210 (D.C. Cir. 1987) 20

Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1993) 19, 20

Los Angeles Police Department v. United Reporting Publishing Corp., 528 U.S. 32 (1999) 28

Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8448) 27

McDonnell v. United States, 4 F.3d 1227 (3d Cir. 1993) 19

Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) 24

North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert denied*, 123 S. Ct. 2215 (2003) 4

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 26, 29

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 26

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 15, 26, 29

United States Department of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749 (1989) 27

United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) 24-25

Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977) 20

STATUTES

Act Abolishing the Star Chamber, II(4), *in Sources of our Liberties* (Richard L. Perry ed. 1959) 27

An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Mar. 3, 1863, 12 Stat. 755, ch. 81 (1863) 28

5 U.S.C. § 552(b) 22

5 U.S.C. § 552(b)(3) 9, 13

5 U.S.C. § 552(b)(7)(A) 9, 12, 13

5 U.S.C. § 552(b)(7)(C) 9, 12

5 U.S.C. § 552(b)(7)(F) 9, 13

Fed. R. Crim. P. 6(e) 9, 13

LEGISLATIVE MATERIAL

DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 108th Cong. (Dec. 4, 2001) (testimony of Gerald H. Goldstein) available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=82 6

MISCELLANEOUS

Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA* (March 2002) available at www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf 6

Laurie P. Cohen, *Detainees on INS Breaches Held in Solitary Status*, Wall St. J., Nov. 1, 2001 6

Barbara Crossette, *Diplomats Protest lack of Information*, N.Y. Times, Dec. 20, 2001 7

Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001 6

Emery P. Dalesio, *Tanzanian Pilot Detained in N.C.*, The Associated Press, Apr. 18, 2002 11

The Federalist No. 84 (Alexander Hamilton) (I. Kramnick ed. 1987). 26-27

Human Rights Watch, *Presumption of Guilt* available at www.hrw.org/reports/2002 /us911 6

John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (1951) 27

Judith Miller and Philip Shenon, *Qaeda Leader in U.S. Custody Provokes Alert*, N.Y. Times, Apr. 20, 2002 12

Judith Miller and David Johnson, *F.B.I. Chief Says Al Qaeda Aide's Arrest Will Help Prevent Attacks by Terrorists*, N.Y. Times, Apr. 4, 2002 11-12

News Conference, Atty Gen. John Ashcroft (June 10, 2002), available at http:\www.usdoj.gov\ag \speeches\2002\061002agtranscripts.htm 11

Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) available at www.usdoj.gov/ OIG/special/03-06/full.pdf 5, 6, 7, 8

William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals 1903-1933* (1963) 16

William Rashbaum, *Captured Qaeda Member Gives Details on Group's* Operations, N.Y. Times, Jul. 27, 2002 11

James Risen and Philip Shenon, *U.S. Says it Halted* Quaeda *Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002 11

Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, Wash. Post, Oct. 15, 2001 6

Rumsfeld *Interview on Fox News Channel*, April 12, 2002, available at http:\www.defenslink.mil \news\Apr2002\04122002_t041fox.html 11

Richard A. Serrano, *U.S. Strike Back Rights Many Held in Terror Probe Report Rights Being Abused*, L.A. Times, Oct. 15, 2001 6

Philip Shenon, *African held After Name is Left in Cave*, N.Y. Times, April 18, 2002 11

PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of a divided decision of the U.S. Court of Appeals for the D.C. Circuit holding that they have no right under the Freedom of Information Act or the First Amendment to be told the names or other basic information relating to over 700 individuals secretly detained by the federal government in the weeks following the September 11, 2001 attacks on New York and Washington. The D.C. Circuit abandoned its proper judicial role, and effectively amended the Act by judicial fiat, when it deferred to government rationales for withholding that (1) were highly questionable on their face and (2) were phrased in such general terms that they wholly failed to account for relevant differences among the detainees. This Court should grant certiorari to ensure that even after September 11, the judiciary will continue to fulfill its constitutional and statutory obligation to provide meaningful review of the exercise of executive power. The lower court's ratification of secret arrests has no precedent in this Nation's laws or history and should be reconsidered by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 331 F.3d 918 (D.C. Cir. 2003), and is reproduced at Pet. App. 1a. The opinion of the District Court is reported at 215 F. Supp. 2d 94 (D.D.C. 2002), and is reproduced at Pet. App. 64a.

JURISDICTION

The decision of the court of appeals was issued June 17, 2003. On September 9, 2003, the Chief Justice extended the time to file this petition to September 29, 2003. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and Sections (a)(3)(A), (b)(7)(A), (C) & (F) of the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), (b)(7)(A), (b)(7)(C) & (b)(7)(F), are reproduced at Pet. App. 104a.

STATEMENT OF THE CASE

In the seven weeks after September 11, 2001, the federal government took more than 1100 individuals into custody in the course of its investigation of the terrorist attacks against the United States. In so doing, the Government not only failed to make public the identities and specific circumstances of each of the detainees, it also took affirmative steps – such as sealing INS records and omitting names from jail rosters – to prevent those facts from coming to light. As reports of civil rights violations against those in custody mounted, Petitioners sought to obtain the names and other basic information about the detainees under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), and the First Amendment. The Government in large part refused this request – although it later released some information about the minority of the detainees who were criminally charged – and Petitioners brought suit. A divided D.C. Circuit panel ultimately held that the Government was not required to disclose the names of the detainees who were never criminally charged, their lawyers' names (if in fact they had counsel), or other basic information under FOIA and the First Amendment – extending this exemption even to the hundreds of detainees whom the Government itself had identified as not of interest to the investigation.

That decision requires review here. It is the responsibility of the courts – and particularly this Court – to provide meaningful judicial review when the Government invokes

national security to justify unprecedented secrecy in exercising its awesome power to arrest and detain hundreds of people. History shows that, in times of crisis and fear, executive officials are prone to overreact, especially in their treatment of minorities in our midst. The requests for information at issue here were designed to shed light on one of the Government's first reactions to September 11 – the swift arrest and lengthy detention of hundreds of people, nearly all Arabs or Muslims. Several interrelated aspects of this sweep of arrests – including not only the secrecy of the operation but also predictable consequences of secret detentions like denials of counsel, lengthy detentions without charges, and reports of abuse by jailors – require careful review of the Government's claims that it could not release the information sought by Petitioners in 2002 and cannot do so now.

But the D.C. Circuit abdicated the proper judicial role, inventing a toothless form of deferential review that gave credence to facially weak government arguments and then compounded that error by assuming they applied with equal force to all those secretly detained, including the large subset of individuals who had been *cleared* of any involvement with terrorism. This reductionist, one-argument-fits-all approach is completely at odds with FOIA case law as well of common sense. As the dissenting judge below noted, it effectively amends FOIA without congressional authorization. The court of appeals also broke with core First Amendment values in concluding that there is no constitutional basis for demanding information from the Government about those whom it has jailed, unless and until the Government chooses to bring criminal proceedings against them.

A. Detainees Arrested in the Weeks After September 11

Beginning on September 11, 2001, "the United States government launched a massive investigation into the attacks as well as into 'threats, conspiracies, and attempts to perpetrate terrorist acts against [the] United States.'" Pet. App. 67a (quoting Declaration of James S. Reynolds ("Reynolds Decl."), Pet. App. 107a, ¶ 2). Six weeks later, on October 25, 2001, the Attorney General announced that nearly 1,000 individuals had been detained as part of this investigation. *Id.* Ten days after that, the number of reported detainees had risen to 1182. Pet. App. 72a n.7. Shortly thereafter, the Department of Justice "announced that it would no longer provide a running total of all individuals detained in connection with the investigation." *Id.*

The Department, although indicating that the detainees fell into three categories – those criminally charged, those held on immigration charges, and those held on "material witness" warrants – refused to disclose the names of those detained, the names of their counsel (if any), the dates of their arrests, any charges that had been brought, or the dates on which any had been released. Pet. App. 69a. Moreover, the Government took affirmative steps to keep the identities of the detainees secret from the public. For example, with respect to the largest group of detainees – those held on immigration charges, who were designated as "special interest detainees" – the Attorney General ordered special procedures making the dockets in their cases secret and precluding government employees from even acknowledging their existence.[1] Similarly, when a state court order

---

[1] Watson Decl. ¶ 9, Pet. App. 131a. *Cf. Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (secret hearings unconstitutional); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (secret hearings not unconstitutional), *cert denied*, 123 S. Ct. 2215 (2003).

enforcing a state statute requiring county jails to keep a public roster of inmates threatened to disclose the names of some INS detainees, the Government issued a new regulation forbidding release of the names.[2] In addition, as we now know, the Government also sharply limited the ability of at least some of the detainees to communicate with the outside world. *See* pp. 7-8 *infra*.

Although these individuals came to the Government's attention in the course of its terrorism investigation, the Government does not claim that the detentions were based on suspicions of complicity in terrorism. To the contrary, individuals often became "September 11 detainees" merely as a result of being questioned and determined to be in violation of INS requirements or unrelated criminal laws.[3] Moreover, the fact that a person was questioned by no means meant that the Government had any credible indications that he was involved with terrorism. As a recent report by the Justice Department's Office of the Inspector General ("OIG") confirmed, the questioning often was triggered by a multitude of unreliable "tips" the Government received from private citizens about Middle Eastern men thought to be suspicious. *See* Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 16 (April 2003) (available at www.usdoj.gov/OIG/special/03-06/full.pdf) ("OIG Report"). In this process, moreover, "no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene." *Id.* Mere proximity, combined with an apparent lack of a valid visa,

---

[2] *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *certification denied*, 803 A.2d 1162 (N.J. 2002).

[3] *See* Reynolds Decl. ¶ 10, Pet. App. 110a; Reynolds Supp. Decl. ¶ 3, Pet. App. 124a.

was enough for an Arab or Muslim individual to find himself secretly detained.[4]

Indeed, the government created a category of "inactive" September 11 detainees, applied to those held on INS charges who never were, or were later determined not to be, of interest to the investigation. By early 2002, long before the first ruling in the courts below, almost half of the INS detainees had been so designated. *See* Def. Amended Ex. 6 in Support of Gov't Mot. for Summ. J. (filed Feb. 5, 2002).

Within weeks after September 11, news stories began to appear that raised serious concerns about the manner in which these individuals were arrested and detained.[5] These articles were corroborated by testimony from lawyers,[6] later by reports from human rights groups,[7] and, much later, by the OIG. Petitioners and many others thus began to question whether detainees were being held based primarily on their

---

[4] A good illustration is one alien who "was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the . . . grocery store in which the alien worked, 'is operated by numerous Middle Eastern men . . . . Too many people to run a small store.'" OIG Report at 17.

[5] *See e.g.*, Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, Wash. Post, Oct. 15, 2001, at A1; Richard A. Serrano, *U.S. Strikes Back Rights Many Held in Terror Probe Report Rights Being Abused*, L.A. Times, Oct. 15, 2001, at A1; Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001, at 1B; Laurie P. Cohen, *Detainees on INS Breaches Held in Solitary Status*, Wall St. J., Nov. 1, 2001 at A8.

[6] *E.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. at 1-3 (Dec. 4, 2001) (testimony of Gerald H. Goldstein) available at http://judiciary.senate.gov/testimony.cfm?id=28&wit_id=82.

[7] *See* Human Rights Watch, *Presumption of Guilt* at 7, 33-45, 67-87, available at www.hrw.org/reports/2002/us911; Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA* at 16-18, 28-38 (March 2002), available at www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf.

ethnicity or religion, were being held incommunicado for long periods without being charged,[8] were being denied meaningful access to counsel, and were subject to physical and mental abuse. The OIG report confirmed a number of these suspicions, finding that after the detainees were secretly arrested, many were not charged for days or weeks and were held in harsh conditions without bail, even when there was no evidence to justify withholding bail. OIG Report at 35, 88. Further, the report found that although some government officials expressed concern about the government's actions, the secret arrests and indeterminate detentions continued. *Id.* at 81-83. The report ultimately concluded, after inquiring into the practices of a subset of the relevant detention facilities, that at least some detainees were never offered counsel or were tricked into forfeiting that opportunity,[9] while others were slammed against walls by

---

[8] In one instance, the Canadian government reportedly protested that a Canadian citizen "disappeared" on September 20, 2001, and his detention was not disclosed by federal authorities for nearly three months. According to published reports, the government failed to disclose his detention despite his requests for consular assistance, and despite inquiries by the Canadian authorities. *E.g.*, Barbara Crossette, *Diplomats Protest Lack of Information*, NY Times, Dec. 20, 2001 at B5.

[9] Some detainees were not offered the opportunity to call an attorney until weeks or months after being incarcerated, or were never given the opportunity to do so at all. Many of those who were allowed to call attorneys were given at most one call per week, and in contravention of official policy, were told that a call resulting in a busy signal or answering machine message counted as the weekly call. OIG Report at 133-34. Moreover, at the Metropolitan Detention Center ("MDC") in New York, where many detainees were housed, the employee in charge of asking whether detainees would like to call an attorney asked them simply "are you okay." An affirmative response was taken by that employee to mean that the detainee—many of whom did not speak fluent English—did not want to contact an attorney. *Id.* at 132. Attorneys also had difficulties visiting detainees. The Department of Justice kept the persons detained in this operation off lists of inmates at the MDC. Consequently, when many attorneys called the MDC to schedule a visit,

guards and kept in fully lit cells 24 hours a day. OIG Report at 142-44, 153.

B. The Proceedings Below

1. The FOIA request and the Government's Responses

On October 29, 2001, acting pursuant to FOIA and the First Amendment, Petitioners sent the Department of Justice three requests for information about persons detained in the wake of the September 11 attacks. Petitioners asked that the Department disclose the name of each detainee and his attorney. They also requested certain other basic information about the detainees and their detention.[10]

In granting Petitioners' request for expedited processing of their FOIA requests, the Government conceded that the request was a "matter of widespread and exceptional media interest in which there exist questions about the

---

or arrived for a visit, they were told the person they wished to see was not at the MDC. *Id.* at 135-37.

[10] Petitioners' request sought information about "the individuals arrested or detained" in the words of Attorney General Ashcroft, in the wake of the September 11 attack and referred to by the President, the Attorney General and the FBI Director in various public statements. Reynolds Decl. ¶ 6, Pet. App. 108a. They asked the Justice Department to tell them the citizenship status of each detainee, where each person was originally detained, where each detainee still in custody was being held, the date on which each was arrested, the date any charges were brought, the date on which any detainee not still in custody was released, the charges brought against each detainee or the other basis on which the detainee was being held—such as a material witness warrant—and the disposition of any such charges or warrants, the name and addresses of any lawyers representing the detainees, the identities of courts that entered sealing orders in proceedings related to these detainees, any sealing orders that have been entered, the legal authorities relied upon by the government in seeking sealing orders, and policy directives or guidance provided to officials on what they can publicly disclose about these detainees. *Id.*

government's integrity which affect public confidence." Pet. App. 69a. Nevertheless, the Department of Justice initially refused to provide any information whatsoever. After the Senate Judiciary Committee scheduled a hearing on the detentions, the Department released a list of the names of those individuals who had been detained and later charged with a crime, along with the nature of the charge. But it kept secret the names of other detainees and their lawyers, if any, stating that all of the requested information was exempt from disclosure under Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A), which applies to release of materials that "could reasonably be expected to interfere with [law] enforcement proceedings," Exemption 7(C), *id.* § 552(b)(7)(C), which applies to release of law enforcement materials that could constitute an "unwarranted invasion of personal privacy," and Exemption 7(F), *id.* § 552(b)(7)(F), which applies to information that could "reasonably be expected to endanger the life or physical safety of any individual." Petitioners then brought suit in the U.S. District Court for the District of Columbia. By the time cross-motions for summary judgment were filed and considered by the District Court during the summer of 2002, the Government had made some additional disclosures concerning persons in two of the categories.

First, the Government produced a somewhat more complete list of criminally charged detainees, showing that there were approximately 129 people in this group, 73 of whom remained in custody by June 11, 2002. Pet. App. at 71a[11] Very few of the criminal charges related in any way to

---

[11] In the District Court, the Government explained its decision to disclose the names of criminally charged detainees as a response to the "constitutional mandate" that "all criminal prosecutions be 'public.'" Defs. Reply in Support of Mot. for Summ. J. at 19 (filed April 15, 2002) (citing the First and Sixth Amendments and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986)).

terrorism, *id.*, and only one defendant on the list, Zacarias Moussaoui (who was arrested prior to September 11), was charged as a conspirator in the September 11 attacks. The government also identified the lawyers for this group, but it continued to withhold information about the dates and locations of the arrests and the dates and locations of the detentions. *Id.*

Next, the Department of Justice acknowledged that 751 individuals had been detained for immigration violations ("INS detainees"). Pet. App. 70a. As of June 13, 2002, 74 remained in custody. *Id.* 79a. As noted above, many of these detainees had been cleared of any link to terrorism. The Government indicated that as of February 2002, 338 of the INS detainees had been placed in "inactive status" based on a determination that they were not "of current interest" to the September 11 investigation. *See* Def. Amended Ex. 6 in support of Gov't Mot. for Summ. J. (filed Feb. 5, 2002); Supp. Reynolds Decl. ¶ 3, Pet. App. 124a; Def. Mem. in Support of Summ. J. 21 (filed Jan. 11, 2002) ("many [detainees] have [been] or may be cleared of wrongdoing"). But the Government refused to divulge even those names. The Government did release for most detainees information about their citizenship status and place of birth, as well as the date on which immigration charges were filed and nature of those charges. Pet. App. 70a. It refused to release their names, the locations of their arrests, the locations of their incarceration, their lawyers' names or the dates of their release, if any. *Id.* Nearly all of the INS detainees came from Arab or Muslim countries. *See* Def. Amended Ex. 6 in support of Gov't Mot. for Summ. J. (Feb. 5, 2002).

The final group consisted of detainees held on material witness warrants. The Government provided *no* information whatsoever about these detainees, Pet. App. 71a, even as it acknowledged that "it may turn out that these individuals have no information useful to the investigation." Reynolds

Decl. ¶ 36, Pet. App. 119a-120a. As to these individuals, the Government in the District Court invoked an additional FOIA exception – Exemption 3, 5 U.S.C. § 552(b)(3), which applies to materials "specifically exempted from disclosure by [another] statute." The claim was that information about material witness detainees was shielded by Federal Rule of Criminal Procedure 6(e)(2)(B), which restricts disclosure of matters "occurring before the grand jury."

Despite its insistence that it could not reveal the names of the many people who were secretly detained in the weeks following September 11 but not alleged to have links to terrorism, the Government did not remain silent about other people it subsequently detained during its investigation, who *were* alleged to be involved in terrorism. For instance, the following April, the FBI announced that it had arrested Issaya Nombo, Adham Hassoun, and Ramsi Al-Shannaq on immigration charges, and disclosed details about why these men had been investigated.[12] It provided similar information about Mohammad Mansur Jabarah, who was detained on a material witness warrant. Pet. App. 77a n.10.[13] Moreover, it has released large quantities of information about other people who have been captured since September 11 and held as terrorists but never criminally charged, including American citizens held as enemy combatants.[14]

---

[12] Emery P. Dalesio, *Tanzanian Pilot Detained in N.C.*, The Associated Press, Apr. 18, 2002; Philip Shenon, *African held After Name is Left in Cave*, N.Y. Times, April 18, 2002, at A15.

[13] William Rashbaum, *Captured Qaeda Member Gives Details on Group's Operations*, N.Y. Times, July 27, 2002, at A8.

[14] *See, e.g.*, News Conference, Atty Gen. John Ashcroft, (June 10, 2002), available at http:\www.usdoj.gov\ag\speeches\2002\061002 agtranscripts.htm; James Risen and Philip Shenon, *U.S. Says it Halted* Quaeda *Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at Al; *Rumsfeld Interview on Fox News Channel*, April 12, 2002, available at http:\www.defenslink.mil\news\Apr2002\04122002_t041fox.html; Judith Miller and David Johnson, *F.B.I. Chief Says Al Qaeda Aide's Arrest Will*

2. The District Court

As noted, the parties presented the District Court with cross-motions for summary judgment. The Government relied primarily on declarations by a senior Justice Department official (James Reynolds) and an FBI Agent (Dale Watson), attempting to explain why it would be harmful to disclose information. *See* Pet. App. 6a-7a.

The District Court, on August 2, 2002, granted summary judgment for Petitioners in part. Relying on FOIA, it ordered the Government to disclose the names of the detainees and their attorneys, but not other information such as the dates and locations of their arrests, detention, and release. The court first ruled that the Government's declarations had failed to show how disclosure of the INS and material-witness detainees' names and attorneys – matching what had already been disclosed concerning the criminal detainees – could interfere with law enforcement proceedings, as required to qualify for Exemption 7(A). Pet. App. 75a-84a. It noted that the declarations provided no evidence that such disclosures would deter witness cooperation or enable suspects to manufacture false evidence – especially as to those detainees not actually involved with any wrongdoing. Pet. App. 77a-80a, 83a-84a.

Moreover, the court rejected the Government's assertions that disclosure of names and addresses would enable suspects to map the investigation and thereby find means to impede it—the Government's "mosaic theory". Pet. App. 80a-83a. It reasoned that allowing such a claim in a criminal enforcement context would essentially allow the Government to withhold all information, however innocuous, in every case. With regard to Exemptions 7(C)

Help Prevent Attacks by Terrorists, N.Y. Times, Apr. 4, 2002, at A14; Judith Miller and Philip Shenon, *Qaeda Leader in U.S. Custody Provokes Alert*, N.Y. Times, Apr. 20, 2002, at A1.

and 7(F) the court found that the privacy interests of detainees could not be used by the Government to justify a blanket refusal to disclose the names of detainees or their attorneys – although it also created an opportunity for individual detainees to "opt out" of public disclosure. Pet. App. 86a. Finally, addressing Exemption 3, the court rejected the idea that Fed. R. Crim. P. 6(e) requires withholding all information about all material witness detainees, as the declarations did not show that all material witness detainees even testified before a grand jury. Pet. App. 89a.

The District Court concluded, however, that disclosure of additional information about the circumstances of the arrest and detention of the detainees, beyond the names of detainees and their counsel, could be of use to terrorists and thus was not required under Exemption 7(A) of FOIA. The court went on to reject Petitioners' alternative argument that the First Amendment creates a right of access to this additional information. Applying the "experience and logic" test derived from this Court's *Richmond Newspapers* line of cases, it found that while there may be a tradition of disclosure of the fact of a person's arrest, that tradition did not extend to the additional information the court had already found not to be subject to disclosure under FOIA.

3. The Court of Appeals

A divided panel of the Court of Appeals reversed the District Court's determination that the names of detainees and their attorneys must be released, holding that FOIA Exemption 7(A) justifies nondisclosure of this information because of the potential for interference with the September 11 investigation. The majority opinion, however, did not demand the kind of evidence of a clear nexus between disclosure and harm that is routinely required in FOIA cases. The majority held that it owed deference to the Government

in "FOIA national security cases" and proceeded to apply a standard of review much less demanding than that applied in prior national security cases.

First, the court focused on whether the Government had shown that disclosure of information regarding *all* of the detainees might provide important information to terrorists. The court thus accepted a general representation that release of a "complete list" of detainees "would give terrorist organizations a composite picture of the government investigation," Pet. App. 17a-18a, as sufficient reason to deny the release of *any* names, including the names of those detainees who were no longer "of interest" to the FBI. The court did not consider the possibility of a partial release designed not to provide a useful roadmap.

Similarly, the court accepted the Government's assertion that *all* of their names must be withheld because *some* detainees who had no link to terrorism *might* otherwise be discouraged from becoming government informants and infiltrating terrorist groups. Pet. App. 20a. Again, it did not consider the possibility that the Government could disclose persons it knew did not fit this description.

The court gave no weight to circumstances that undercut the logic of the Government's position. Thus, it rejected the argument that the Government's refusal to provide any information was much less defensible if, as the Government maintained, detainees were themselves free to communicate their status to the outside world. Pet. App. 21a. And the court also rejected as irrelevant the fact that the Government itself had announced the arrest and detention of a number of persons actually linked to terrorism – speculating on the basis of no evidence that these disclosures may have been for strategic reasons. Pet. App. 22a.

Turning to the First Amendment, the majority then ruled that there is no constitutional right of access to any

information that is non-judicial and "not part of a criminal trial." Pet. App. 28a. It reasoned that the two-part test governing the First Amendment right of access to information in the Government's control, outlined in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), applies only to access to judicial proceedings or transcripts of such proceedings, and thus that there is no constitutional basis for a request for information about arrestees not yet (or never) brought up on charges.

In dissent, Judge Tatel criticized the majority for having "converted deference into acquiescence." Pet. App. 40a. He also criticized the majority's willingness to apply government explanations for nondisclosure to broad categories of detainees, instead of requiring the disclosure of those subsets of information for which the Government's rationales were not persuasive. *Id.* at 40a-41a. While challenging the notion that the Government's arguments were entitled to any special deference, he concluded that the Government's case failed regardless whether deference was given to it. *Id.* at 38a-39a. This was because the Government never provided *any reason to think* that releasing the names, or other personal information, of detainees *not linked to terrorism* would harm its investigation. *Id.* at 44a. He emphasized that the Government drew no distinction between individuals cleared of any terrorism connections and others on the list, and that this categorical approach was wholly impermissible under FOIA. *Id.* He suggested that the majority's approach effectively "change[d] the law in Congress' stead," and concluded that the District Court properly ordered disclosure at least as to those detainees lacking links to terrorism. Pet. App. 63a.

REASONS FOR GRANTING THE WRIT

It can hardly be doubted, in the wake of September 11, that the Government has weighty obligations to try to prevent future terrorist attacks and to apprehend and punish those responsible for past attacks. But neither can it be doubted that times of crisis and fear demand vigilance from citizens and their courts to assure that the counter-measures adopted by the executive are consistent with our fundamental values and constitutional principles. Here, Petitioners made their requests for information about the secret arrest of hundreds of Arabs, Muslims, and others, because the secrecy surrounding the arrests made vigilance impossible. They then asked the courts to play their appointed role under FOIA and the First Amendment in reviewing in a meaningful way the Government's claim that public oversight was not consistent with national security. The D.C. Circuit, however, did not answer that call, instead accepting at face value explanations from the Government that made little sense, could not be squared with the Government's own conduct, and blurred all potential distinctions among different categories of persons in detention. That decision merits review by this Court.

This is not the first time the Government has reacted to a perceived threat with massive arrests of persons of foreign origin. But those past events, including both the "Palmer Raids" of 1919[15] and the internment of Japanese-Americans in World War II, are painful memories because they came to be understood as extraordinarily harmful overreactions. The same description may or may not be apt in the current

---

[15] The Palmer Raids, a reaction to the "Red Scare" after World War I and bombings attributed to radicals, involved arrests of thousands of persons – most of them of foreign extraction – who were rounded up without probable cause. Few if any actual plots against the Government were uncovered. *See generally* William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals 1903-1933*, at 209-29 (1963).

circumstances, but what is certain is that the unprecedented secrecy associated with the 2001 detentions has prevented the public from making that judgment.

FOIA was designed to provide a remedy for such a barrier to democratic oversight, absent a persuasive showing that openness would do more harm than good. The D.C. Circuit short-circuited that statutory protection by adopting a toothless form of judicial "scrutiny" that has no precedent in prior FOIA cases – even those involving access to classified documents or intelligence sources and methods. *See, e.g.*, *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *Hayden v. National Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1989). Such an approach, as a practical matter, transforms FOIA by judicial fiat into a statute under which citizens request information from their elected leaders and those leaders then decide for themselves what information they wish to disclose. It may sometimes be understandable for courts to defer to the Government in national security matters, but deference does not imply withholding meaningful scrutiny altogether, especially where there are countervailing interests of constitutional magnitude at stake.

The D.C. Circuit further erred in ruling that the First Amendment is not implicated by secret arrests. Even leaving aside FOIA, all of the policies that underlie this Court's *Richmond Newspapers* line of cases apply equally to the issue of withholding information concerning persons who have been arrested by the Government but not yet brought to court (if indeed they ever will be).

The information Petitioners seek is a vital prerequisite for the public to assess its government's response to September 11. Names of detainees could reveal a pattern of discrimination; names of their attorneys could show who may have been denied counsel and lead to other information; and dates of arrest could show the length of detention.

Based on both internal and external reports there is every reason to think that some of those arrested were treated illegally. The fact that most of those detained are no longer in custody gives more not less reason to be concerned that the Government acted improperly in secretly detaining them in the first place.

This Court should therefore grant review here to assess the justifications offered for the Government's refusal to disclose this information, which continues to this day. Such review would serve to assure that the Government is not merely avoiding scrutiny of a discriminatory overreaction to the September 11 attack and to deter future deprivations of civil liberties.

I. THE MAJORITY BELOW ERRED IN GIVING UNPRECEDENTED DEFERENCE TO GOVERNMENT EXPLANATIONS THAT WERE UNPERSUASIVE ON THEIR FACE, OVERLY BROAD, AND WITHOUT ANY SUPPORT IN THE RECORD.

The D.C. Circuit in this case was the first court to extend the deferential form of review previously applied only in cases involving FOIA Exemption 1 (classified material) or Exemption 3 (intelligence information protected under the National Security Act) to a law enforcement context. But even assuming that this novel application of deference was appropriate – and there is good reason to conclude otherwise, *see* Pet. App. 38a-39a (Tatel, J., dissenting) – the D.C. Circuit went too far in applying a standard that effectively eliminated any meaningful judicial role. For even under the deferential standard applied in previous national security cases, the D.C. Circuit was still obliged to reject to agency allegations that were fatally flawed by a "lack of detail and specificity . . . [and a] failure to account for contrary record evidence." *Campbell v. United States Dep't of Justice*, 164

F.3d 20, 30 (D.C. Cir. 1998). This Court should grant review to make clear that a national security crisis is no justification for courts allowing the Government to evade so easily its responsibilities under FOIA – and that courts cannot ignore the vital countervailing interests at stake such as the individual rights Petitioners here seek to enforce.

As Judge Tatel recognized in his dissent, D.C. Circuit law has never equated deferential review with "'vacuous'" review. *See* Pet. App. 39a (quoting *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982)). Instead, even in applying Exemptions 1 and 3, prior cases have required "justifications [that are not] controverted by contrary evidence," *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992), and that do not rely upon "vague or sweeping" assertions. *Hayden*, 608 F.2d at 1387; *see also, e.g.*, *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) (requiring Exemption 1 affidavits to exhibit "reasonable specificity" and a "logical connection between the information and the claimed exemption") (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982)); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (requiring that the government show a "rational link" between disclosure and harm). A critical tenet of FOIA analysis is that the government may not lump together distinct categories of information and withhold them under a single rationale that applies, at best, only to a subset of the information sought. *See, e.g.*, *Crooker*, 789 F.2d at 67.

The Exemption 1 and 3 cases cited by the D.C. Circuit for the proposition that deference is necessary do not support the form of unquestioning review actually applied here. Those cases all involved government rationales for withholding that had a logical coherence based on a discussion of particular facts and were not "controverted by contrary evidence." *Hunt*, 981 F.2d at 1119. For example, in *Krikorian v. Department of State*, 984 F.2d 461 (D.C. Cir.

1993), the D.C. Circuit accepted an Exemption 1 withholding claim in part on the basis of an declaration that stated that the classified material in question had been obtained from a foreign government on the premise that it would remain confidential. The court accepted the government's argument that disclosing the information would jeopardize "reciprocal confidentiality," *id.* at 464-65, but it also remanded the case to determine whether "portions of the documents may not be exempt" because they did not implicate such concerns. *Id.* at 466-67.[16]

The generalized rationales for non-disclosure offered in this case fall far short by comparison. As a preliminary matter, it is worth noting that of those whose names were withheld, none were criminally charged and a mere handful were charged with terrorism-related violations of the immigration laws. Indeed, the Government's declarations actually made no claim that any person whose name was withheld was linked to terrorism.[17] Nevertheless, the Government offered four reasons, which were summarized in the first Reynolds declaration, why it could not safely

---

[16] *See also CIA v. Sims*, 471 U.S. 159, 179 (1985) (where court ruled that researcher's names were covered by intelligence sources exemption, and affidavit stated that disclosure of the names of researcher's academic institutions would enable a person to discern the identities of the individual researchers, the court gave the affidavit some deference, and withheld institutional affiliation from disclosure); *Weissman v. CIA*, 565 F.2d 692, 698 (D.C. Cir. 1977) (agency affidavits that summarize each document or document section withheld for national security reasons are entitled to deference, where there is no reason to question their veracity); *King v. United States Dep't of Justice*, 830 F.2d 210, 221-23 & n.92 (D.C. Cir. 1987) (affidavit submitted in support of Exemption 1 claim where deleted parts are marked with a code saying that information falls into a one of a few broad categories, such as "information concerning intelligence activities, sources, and methods" is insufficiently specific to warrant the district court's deference).

[17] This glaring omission contradicts the D.C. Circuit's assertion that "many of the detainees have links to terrorism." Pet. App. 23a-24a.

release the names of any of the detainees (or disclose their attorneys, if any):

1. Revealing the names could yield the names of "individuals associated with them, other investigative sources, and potential witnesses" and could subject the detainees to intimidation by terrorist groups. Reynolds Decl. ¶ 14, Pet. App. 111a-112a.

2. Revealing the names could deter detainees from cooperating after their release and impair their ability to infiltrate into terrorist organizations. *Id.* ¶ 15, Pet. App. 112a.

3. Revealing the names could "reveal the direction and progress of the investigations by identifying where DOJ is focusing its efforts." *Id.* ¶ 16, Pet. App. 112a-113a.

4. Revealing the names could "allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence." *Id.* ¶ 17, Pet. App. 113a.

As both the District Court and Judge Tatel in dissent noted, these rationales suffer from two obvious faults. First, the government has maintained throughout this litigation that all detainees have been free to communicate with the outside world. Although there is significant evidence contradicting this contention, if the Government's sworn declaration on this point is correct, the detainees themselves could bring about most or all of the harms cited as reasons to block Petitioners' FOIA request. Indeed, with the passage of time, any terrorist associates of those detained would realize their detention, making it unlikely that disclosing this information to Petitioners would be harmful. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 708 (6th Cir. 2002).

Second, the Government itself has, with some fanfare, released large amounts of information about other individuals who were directly linked to terrorist conspiracies.

By comparison, it is difficult to see what harm could arise from the release of information about individuals the Government has not even accused of terrorism connections. Although the court below suggested that this partial release of information could be part of a calculated strategy, no government official ever explained (or even referred to) such a strategy under oath. On the contrary, the Government's selective release of data at least suggests that it is willing to celebrate its successes but would rather hide its more questionable practices.

The Government's arguments only become weaker – and the lower court's decision more out of line with FOIA precedent – in light of the fact that it has indiscriminately offered these rationales for all of the detainees, including those never suspected of, or innocent of any connections to terrorism. Such generalizations are impermissible under FOIA, which requires that even where part of the requested material is exempt from disclosure, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record . . . ." 5 U.S.C. § 552(b). As Judge Tatel noted, the courts have interpreted this provision to require the "government [to] divide [the] information it seeks to withhold into categories [that are] sufficiently distinct to allow a court to grasp how each . . . category of documents, if disclosed would interfere with its investigation." Pet. App. 40a-41a (quoting *Crooker*, 789 F.2d at 67) (internal quotation marks omitted; final two alterations in original). Indeed Judge Tatel, in remarking that the Government had released so much information about other individuals in its custody, questioned "why, particularly in light of FOIA's exacting standards, [the Government did not] make those distinctions in its exemption request before this court." Pet. App. 49a.

With respect to the cleared detainees, the first and fourth of the Government's rationales simply do not apply, because

they assume a link to terrorism. For example, the Government cannot explain how revealing the names of innocent persons – persons caught up in a broad sweep of arrests that targeted Middle Eastern men – would have led to them being intimidated by terrorist groups or, even more outlandishly, "allow[ed] terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence."

The second and third rationales fare little better. The Government claims, for example, that it could not have released names (or names of counsel, or place of detention, etc.) for persons with no prior link to terrorism, because that would have compromised its ability to make them into informants after their release or deportation. In other words, the Government asserts that it has the right to detain persons innocent of serious wrongdoing and hide those detentions based on the hope that it can persuade the detainees to become undercover agents in the future. The Government never explained how likely or common this scenario was, or why it could not identify detainees who had no who had no plan to become informants – especially by the time of the District Court's ruling, months after most of the detainees had been released.

The third rationale – that disclosure could provide a roadmap of the government investigation – also provides little support for refusal to make a partial disclosure regarding the "innocent" detainees. Disclosure of names, if limited to persons previously unknown to terrorists, would tell them what they already knew – that the Government was interviewing thousands of foreign nationals and pursuing a multitude of public tips. Metaphors about "mosaics" should not be allowed to obscure this basic distinction.

It may be that the Government could have offered some justification for ignoring the distinction between suspected

and "innocent" detainees. But it did not try to do so. Even in the national security context, the courts should not paper over such a gap in the Government's evidence by endorsing the Government's effort to treat all the detainees as an undifferentiated group. FOIA requires the government to justify any withholding through a particularized showing. At a minimum that means that the government cannot rely on a blanket justification where that blanket does not fit everyone it purports to cover.

Nor should the courts disregard the significant countervailing interests at stake in this case. Petitioners had compelling reasons for inquiring into the circumstances under which a large number of citizens and foreign nationals – including many with no terrorist connections – found themselves caught up in a large scale dragnet. And there was reason to ask whether the Government, having indulged in such an immediate response to the terrorist attacks, was seeking to cover its tracks even as it reassured the public by announcing apprehensions of true suspects. In this regard the majority below should also have considered that arrests have never before been done in secret in this country, despite the many security concerns we have faced over the years. *See* pp. 27-28 *infra*; *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) ("'secret arrests' [are] a concept odious to a democratic society").

If the D.C. Circuit ruling is allowed to stand, it will send a disturbing signal that the executive branch is free to withhold even the most basic information about the individuals it has detained – most notably their names, their counsels' names, their dates of arrest and detention, and their places of detention – on the basis of nothing more than a patently unpersuasive invocation of national security concerns. FOIA is Congress's chosen approach to facilitating the public's fundamental interest in knowing "what its government is up to." *United States Dep't of Defense v.*

Federal Labor Relations Auth., 510 U.S. 487, 497 (1994). The D.C. Circuit has eviscerated the values of that statute, making it a paper tiger in the face of a regime of secret arrests. At a time when thoughtful reasoning is more necessary than ever to avoid unwarranted intrusions into civil liberties, this Court should hear this case to restore those values. As the District Court here put it, "the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship." Pet. App. 66a.

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FIRST AMENDMENT PROHIBITS SECRET ARRESTS AND DETENTIONS, EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES.

In the District Court, the Government expressly acknowledged prior to any litigation in this case that it had a constitutional obligation to reveal the names of those detainees who were charged criminally, as well as the nature of the charges. *See* note 11 *supra*. The concession was correct, for it hardly makes sense to read the First Amendment as requiring public access to criminal trials and preliminary hearings but not creating at least a qualified right to know who is in custody on criminal charges awaiting such a public proceeding. The need for public scrutiny as a check on governmental abuse of the criminal process begins when a defendant is taken into custody and thus suffers a deprivation of liberty.

The Government, however, persuaded the majority below that the First Amendment is not implicated by secret arrests, unless and until criminal charges are filed. Pet. App. 28a. Indeed, the court would have limited the First Amendment right of access more narrowly than the

Government itself – limiting it to claims of access to criminal proceedings in open court. *Id.* at 30a. This Court should grant review here to determine whether that constitutional line makes any sense.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the landmark case that found a public right of access to criminal trials, the Court focused on two considerations. 448 U.S. at 578-80. First, it examined whether there has traditionally been public access to criminal trials. *Id.* at 565-69. Second, it analyzed the purpose that public access serves in a democracy, finding that it helps ensure that the justice system appears fair and is fair. *Id.* at 570-72. The Court later converted these considerations into a "logic and experience" test and applied that test to hold that there is a right of public access to the preliminary hearing and voir dire phases of a criminal prosecution. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise II*").

Here, those two considerations both point toward a rule generally barring secret arrests and detentions. First, applying the logic prong, the fact that detainees may never be criminally charged makes *public* scrutiny of their detention more, not less vital. As the Sixth Circuit recently elaborated, political checks are the only restraint on the Government's awesome power to arrest and detain in such situations, and public access is therefore functionally essential. *Detroit Free Press*, 303 F.3d at 682-83. Alexander Hamilton noted this reality in the *Federalist Papers*:

> "To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the

> person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

The Federalist No. 84, at 474-75 (Alexander Hamilton) (I. Kramnick ed. 1987).

Second, applying the experience prong, the traditions of this country strongly support a right of access to information about those who have been arrested. In the Anglo-American system of government, arrests have been public events since England abolished the infamous Star Chamber in 1641. Its system of secret arrests and trials had been a "means to introduce an arbitrary form of government." Act Abolishing the Star Chamber, II(4), *in Sources of our Liberties* 139 (Richard L. Perry ed. 1959). The Founders were aware of this history, viewing secrecy as an "instrument[] of [o]ld [w]orld tyranny." *United States Dep't of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 772 (1989).

In modern times, police blotters, which include records of each person detained, have been public since they were first used. Moreover, throughout our history, concerns about sedition have not been treated as a justification for secret arrests. Arrests for violating the Alien and Sedition Acts were disclosed to the press. John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* 64-65, 99-100 & n.31 (1951). Arrests pursuant to the Alien Enemies Act, which gave the president power to detain any "dangerous" alien during the war of 1812, were decreed to be "public measures," by Justice Washington when riding circuit. *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8448). And during the Civil War, when Abraham Lincoln suspended the writ of habeas corpus, Congress insisted that the President furnish the Courts with a list of all persons held by his authority who were not prisoners of war.

An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Mar. 3, 1863, 12 Stat. 755, ch. 81 § 2 (1863).

In sum, there is a strong argument that the Government exceeded constitutional bounds when it claimed complete immunity from constitutional scrutiny for its secret arrest and detention of the non-criminal detainees. To be sure, the First Amendment would not prevent the Government from seeking to persuade a court that a particular arrest and detention or group thereof needs to be secret for compelling reasons of national security. But for all the reasons set forth in Part I, it is unlikely such a showing could have been made for all, if any, of the detainees rounded up after September 11.

The only way to avoid these conclusions would be to accept the ruling of the majority below that the entire *Richmond Newspapers* analysis is categorically inapplicable to claims seeking access to information about arrests and detentions – or at a minimum is triggered only when detainees are criminally charged. But while the Court has never had occasion to rule that the *Richmond Newspapers* test applies outside the context of claims of access to hearings or trial in criminal prosecutions, it has likewise never refused to do so.[18]

Moreover, it is difficult to see any justification for barring application of *Richmond Newspapers* to a category

---

[18]Certainly *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), cited by the majority below, did not establish a rule that the First Amendment allows secret arrests and detentions. Although the Court did suggest in *dicta* that the government could constitutionally deny access to some information about arrestees, *id.* at 40, it did so in a case where the government claimed only the right to withhold access to arrestee addresses from commercial businesses intending to solicit criminal defendants and offer them their services.

of information where the *Richmond Newspapers* test, if applied, would itself support recognition of a right of access. That means, by definition, that the First Amendment considerations this Court has elaborated are in fact at stake. Thus, in discussing criminal trials in *Richmond Newspapers*, the Court noted that openness "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged . . . the misconduct of participants, and decisions based on secret bias or partiality." 448 U.S. at 569 (citing M. Hale, *The History of the Common Law of England* 343-45 (6th ed. 1820); 3 W. Blackstone, *Commentaries* 372-73). Indeed, the Court noted Bentham's belief that, "Without publicity, all other checks [on government misconduct] are insufficient." *Id.* (quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827)). In *Press Enterprise II*, the Court reiterated these sentiments. Some "proceedings plainly require public access," it said. 478 U.S. at 9. This is because disclosure "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (quoting *Press Enterprise I*, 464 U.S. at 501).

The very nature of detention underscores the need to apply to this case the same rigorous, yet balanced First Amendment standard that the Court applied to voir dire and preliminary hearings. *First*, detention, like the voir dire at issue in *Press Enterprise I*, and the preliminary hearing at issue in *Press Enterprise II*, is often a critical first step in the process by which society deals with those who violate our laws. *Second*, and more importantly, any detention of the kind involved here is a massive deprivation of one's liberty. Proceedings like a trial, voir dire, and the preliminary hearing are merely procedures for answering the underlying question raised whenever anyone is taken into custody – whether the deprivation is legitimate and should be continued. Where such procedural checks do not occur,

because the Government has the discretion to decide whether to institute the criminal charges that eventually trigger proceedings, the detainee has an even stronger interest in the safeguards that result from openness and the public has an even stronger interest in knowing how the power to detain is being exercised and in preventing abuses and misconduct. Indeed, that is the only way the public can get a complete picture of those whom the Government arrests but never criminally charges.

Application of the *Richmond Newspapers* test in this context would not mean that the First Amendment would become a free-floating constitutional version of the Freedom of Information Act. To the contrary, the qualified First Amendment right of access could sensibly be limited to those few additional contexts where the principles underlying *Richmond Newspapers* are just as applicable, if not more so – *i.e.*, to any governmental exercise of the power to detain, a power that is essential to our domestic security but also, as Hamilton put it, a uniquely "dangerous engine of arbitrary government" when exercised in secret.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

KATE MARTIN
JOSEPH ONEK
CENTER FOR NATIONAL
SECURITY STUDIES
1120 19th Street, N.W.
Washington, D.C. 20005
(202) 721-5650

PAUL M. SMITH
Counsel of Record
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20036
(202) 639-6000

STEVEN R. SHAPIRO
LUCAS GUTTENTAG
LEE GELERNT
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

ELLIOT M. MINCBERG
PEOPLE FOR THE
AMERICAN WAY
FOUNDATION
2000 M Street, N.W.,
Washington, D.C. 20036
(202) 467-4999

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, NW, #119
Washington, D.C. 20036
(202) 457-0800

DAVID L. SOBEL
ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Ave., NW
Washington, D.C. 20009
(202) 483-1140

Counsel for Petitioners